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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973
No.

JOHN RICHARD TOSINI,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered in the above entitled cause on May 29, 1974. That decision affirmed the judgment of conviction rendered against Petitioner Tosini on November 15, 1973 by Hon. Anthony Alaimo sitting without a jury in the United States District Court for the Southern District of Georgia.

Petitioner Tosini was indicted and convicted of a single count of kidnapping, a violation of Title 18, United States Code, Section 1201. Petitioner Tosini was given a sentence of two years probation.

The Court of Appeals for the Fifth Circuit affirmed the conviction with no opinion.

JURISDICTION

The decision of the United States Court of Appeals for the Fifth Circuit was rendered on May 29, 1974. No request for an extension of time to file this petition has been made.

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTE INVOLVED

18 United States Code §1201 (a)

Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

1. the person is willfully transported in interstate of foreign commerce

2. any such act against the person is done within the special maritime and territorial jurisdiction of the United States

3. any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958 as amended [49 U.S.C. 1301(32)]; or

4. the person is a foreign official as defined in section 1116(b) or an official guest as defined in section 1116(c)(4) of this title, shall be punished by imprisonment for any term of years or for life.

QUESTION PRESENTED

Whether the Federal kidnapping statute applies to the conduct complained of here

where the alleged victim was amicably released shortly after crossing the state line after an attempt to recover money owed to the Petitioner Tosini by the victim.

STATEMENT OF THE CASE

John Richard Tosini was convicted on November 15, 1973, by the Hon. Anthony Alaimo, a jury trial having been waived, in the United States District Court for the Southern District of Georgia: Savannah Division, for violation of Section 1201, Title 18 of the United States Code. Defendant-Petitionerwas indicted in a one count indictment and convicted. He received a sentence of two years probation.

The complainant, Anthony Finch, had offered to purchase one pound of marihuana

for Defendants Tosini, Popp, and McGough approximately two months before the crime alleged. Finch was given $150 and he then went to a house in Savannah, Georgia where he claimed he could obtain the drug while the defendants waited outside. He testified that once inside the house, he "got high" and doesn't remember what happened. He does remember that he neither got the marihuana nor returned the money. He then left the house and entered an automobile containing several of his friends and drove away. When the petitioner and his friends followed the car and asked for the return of their money, a female occupant took out a tear gas gun and threatened them.

The Incident

Two months later Tosini, Popp, and McGough accompanied by Dean and Melendez

returned to Savannah to look for Finch and to attempt to procure the return of the stolen $150. They spotted Finch and a friend, William Morgan, in the street. Finch offered to sell Dean and Melendez marijuana, and they lured him to the car where Tosini, Popp, and McGough were waiting. Finch was then forced into the car and when he resisted, was roughed up. A toy gun was drawn by Popp to induce Finch to enter the car. Finch's friend was released when Finch entered the car. Once in the car Melendez threatened to cut Finch's hair with a small knife. He also reportedly held Finch by the hair. The car was driven into South Carolina and after Finch had agreed to do what he could to return the money, he was released on a country road. About $12.50 was taken from Finch during the trip, Finch having volun-

tarily contributed $2.50 for gas. He subsequently made contact with local police in South Carolina in order to obtain transportation back to Savannah.

A look at the testimony of Anthony Finch at the preliminary hearing will underscore the true nature of this incident. Even at this point in the proceedings, Finch never considered himself as being kidnapped. He thought of the whole incident as nothing more than an unpleasant experience, and would have preferred to drop the whole matter. He believed that he would not have been roughed up at all if he hadn't resisted getting into the car. Once they began driving, he and the defendants spoke only of recovering the money he owed them. Finch did not consider himself to have sustained any injury and characterized his alleged abductors

as very nice and polite. He told them that if they took him to Guyton, Georgia he would pay them the money he owed, and he voluntarily supplied money to buy gasoline.

As the ride continued the men began socializing and after alighting from the vehicle, Finch smoked a cigarette with the defendants as he leaned against the outside of the car.

Finch was released in Bluffton, South Carolina, barely ten (10) miles from Savannah, Georgia where he had been picked up.

The Trial

The essential facts in this case were not in dispute and much testimony was disposed by stipulation at the trial. The statements given by each of the five indicted marines to the F.B.I. is to be given the

full weight and effect of testimony given in open court. The trial consisted primarily of arguments to the judge, a jury trial having been waived, concerning the applicability of the statute to the stipulated facts. At the close of the trial the judge ordered written memoranda on this point and subsequently rendered his decision. (A copy of the findings of the District Court is attached in the appendix.)

REASONS FOR GRANTING THE WRIT

This case places in issue the question of the extent of Federal jurisdiction of crimes through use of specialized Federal criminal statutes.

The particular statute involved is 18 United States Code §1201(a) - the Federal Kidnapping Statute.

Prior to 1932, kidnapping was not a Federal offense. As a result of a sudden increase in the incidence of this crime and in reaction to one particularly notorious case, the so-called "Lindbergh Law" was enacted. In Chatwin v. United States, 326 US 455, 66 S.Ct. 233 (1946), this Court outlined the objectives of the Federal Kidnapping Act.

> This statute was drawn in 1932 against a background of organized violence. 75 Cong. Rec. 13282-13304. Kidnapping by that time had become an epidemic in the United States. Ruthless criminal bands utilized every known legal and scientific means to achieve their aims and to protect themselves.
>
> Victims were selected from among the wealthy with great care and study. Details of the seizures and detentions were fully and meticulously worked out in advance. Ransom was the usual motive. "Law enforcement authorities, lacking coordination, with no uniform system of intercommunication and restricted in authority to activities in their own jurisdiction, found themselves laughed at

by criminals bound by no such inhibitions or restrictions * * * The procedure was simple - a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned." Fisher and McGuire, "Kidnapping and the So-called Lindbergh Law," 12 New York U.L.Q. Rev. 646, 653. See also Hearing before the House Committee on the Judiciary (72d Cong., 1st Sess.) on H.R. 5657, Serial 4; Finley, "The Lindbergh Law," 28 Georgetown L.J. 908.

It was to assist the states in stamping out this growing and sinister menace of kidnapping that the Federal Kidnapping Act was designed. Its proponents recognized that where victims were transported across state lines only the federal government had the power to disregard such barriers in pursuing the captors. H. Rep. No. 1493 (72d Cong., 1st Sess.); S. Rep. No. 765 (72d Cong., 1st Sess). Given added impetus by the emotion which gripped the nation due to the famous Lindbergh kidnapping case, the federal statute was speedily adopted. See 75 Cong. Rec. 5075-5076, 13282-13304. Comprehensive language was used to cover every possible variety of kidnaping followed by interstate transpor-

> tation. Armed with this legislative mandate, federal officials have achieved a high and effective control of this type of crime. 326 U.S. at 462-63.

The Report of the House Committee on the Judiciary, cited above, emphasized the reason why Federal intervention was needed:

> It has been represented to the Committee on the Judiciary by members of the constabulary of States where the crime of kidnapping is prevalent that when the person kidnaped is transported beyond the jurisdiction of the State where the kidnaping takes place, such officers are handicapped in the detection, arrest, and punishment of those guilty of such kidnaping by the fact that they are prevented by the barrier of State lines from pursuing the kidnapers beyond their respective States, and have no power to call from another State witnesses to testify against persons charged with kidnaping. H. Rep. No. 1493, 72d Cong., 1st Sess. (1932) at 2.

The Senate Report indicated a similar intent:

> The purpose of this proposed legislation is to assist the States

> in stamping out the growing menace of kidnaping. Kidnapers often seize a person in one State and transport him into another State. The police officers of the first State have no authority to follow into the second State but are compelled to rely wholly on the efforts of the police officers of the second State. S. Rep. No. 765, 72d Cong., 1st Sess. (1932) at 1-2.

It is clear that the Federal legislation was not intended to create a "new" crime as such but was to provide a means by which Federal law enforcement authorities could intervene in the investigation and apprehnsion of individuals who committed the traditional crime of kidnaping in the various states. Transportation across state lines was required in the Federal statute not as a true element of the crime of kidnaping but as a necessary predicate for Federal jurisdiction. See A Rationale of the Law of Kidnapping, 53 Col. L. Rev. 540, 544-45 (1953).

Thus in Chatwin v. United States, supra, this Court held that the act of participating in illicit relations or contributing to the delinquency of a minor, followed by interstate transportation, does not constitute a crime under the Federal Kidnaping Act.

> But the broadness of the statutory language does not permit us to tear the words out of their context, using the magic of lexigraphy to apply them to unattractive or immoral situations lacking the involuntariness of seizure and detention which is the very essence of the crime of kidnaping. Thus, if this essential element is missing, the act of participating in illicit relations or contributing to the delinquency of a minor or entering into a celestial marriage, followed by interstate transportation, does not constitute a crime under the Federal Kidnaping Act. No unusual or notorious situation relating to the inability of state authorities to capture and punish participants in such activities evidenced itself at the time this Act was credenced; no authoritative spokesman indicated that the Act was to be used to assist the states in these matters, however unlawful and obnoxious the character of these activities might otherwise be. Nor is there any indication

that Congress desired or contemplated that the punishment of death or long imprisonment, as authorized by the Act might be applied to those guilty of immoralities lacking the characteristics of true kidnapings. In short, the purpose of the act was to outlaw interstate kidnapings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that plain fact in mind. See United States v. American Trucking Associations, 310 U.S. 534, 543, 544, 50 S.Ct. 1059, 1063, 1064, 84 L.Ed. 1345.

Were we to sanction a careless concept of the crime of kidnaping or were we to disregard the background and setting of the Act the boundaries of potential liability would be lost in infinity. A loose construction of the statutory language conceivably could lead to the punishment of anyone who induced another to leave his surroundings and do some innocent or illegal act of benefit to the former, state lines subsequently being traversed. The absurdity of such a result, with its attendant likelihood of unfair punishment and blackmail, is sufficient by itself to foreclose that construction. 326 U.S. at 464-65.

Under circumstances somewhat similar

to those in Chatwin, supra, the District of Georgia, recently vacated a life sentence based upon a Federal kidnapping conviction. Shaw v. United States, 299 F.Supp. 824 (S.D.Ga. 1969).

In Shaw, the defendant was charged with inveigling, decoying, kidnapping and holding a 14 year old girl for coition purposes and transporting her interstate. Relying on Chatwin, supra, the court indicated:

> As far as Mildred is concerned, everything fitted rather nearly into the four corners of the Kidnaping Act. If she was not kidnaped in the ordinary sense of the word, she was "inveigled" or "decoyed" with the language of the statute. She was transported to another state by the defendant. If she was not "held for ransom," she was held "otherwise", that is to say, for the purpose of coition. If she was not physically held or forcibly kept she was "held" through fear and when she was liberated she was not freed "unharmed" since Shaw had had forcible sexual relations with her.

> . . . If the facts fell within the letter of the Kidnaping Act, they were hardly within its spirit. 299 F.Supp. at 832.

State courts have applied the Supreme Court's reasoning in Chatwin to an analagous problem which arises in state kidnapping prosecutions. People v. Levy, 15 N.Y. 2d 159, 256 N.Y.S.2d 793, 204 N.E. 2d 842 (1965); People v. Lombardi, 20 N.Y. 2d 266, 282 N.Y.S. 2d 519, 229 N.E. 2d 206 (1967); People v. Daniels, 71 Cal. 2d 1119, 30 Cal. Rptr. 897, 459 P. 2d 225 (1969).

In the landmark decision of People v. Levy, supra, defendants accosted a husband and wife as they pulled up in front of their house and forced them at gunpoint back into their car. One defendant took over control of the vehicle and drove for 20 minutes while the other robbed the victims of their jewelry and wallet. The defendants were subsequently convicted of kidnapping as well as first

degree robbery and possession of a pistol.

The New York Court of Appeals reversed the judgments on the kidnapping counts and directed dismissal of those counts as a matter of law. The court observed:

> Kidnapping is, by contemporary statutory standards, one of the most serious of crimes. In our era, this crime has assumed particularly reprehensible forms ...
>
> In basic concept the crime of kidnapping envisages the asportation of a person under restraint and compulsion. Usually the complete control of the person and the secrecy of his location are means of facilitating extortion. But since the control may be accomplished in a variety of ways, the New York statute has been drafted in very broad terms. Much of the definition related to traditional forms of kidnapping, but literally embraced in its terms any restraint. It provided, e.g., that one who "confines" another with intent to "cause him * * * to be confined" against his will is guilty of kidnapping (Penal Law, §1250 former subd. 1).
>
> This definition could literally overrun several other crimes, notably

> robbery and rape, and in some circumstances assault, since detention and sometimes confinement, against the will of the victim, frequently accompany these crimes. Some of the definitions could apply alike to kidnapping and abduction. It is a common occurrence in robbery, for example, that the victim be confined briefly at gunpoint or bound and detained, or moved into and left in another room or place.
>
> It is unlikely that these restraints, sometimes accompanied by asportation, which are incidents to other crimes and have long been treated as integral parts of other crimes, were intended by the Legislature in framing its broad definition of kidnapping to constitute a separate crime of kidnapping, even though kidnapping might sometimes be spelled out literally from the statutory words. 15 N.Y. 2d at 163-64, 204 N.E. 2d at 843-45.

The court then went on to overrule a previous case in which convictions for kidnapping as well as rape and assault were sustained and expressly "limit[ed] the application of the kidnapping statute to 'kidnapping' in the conventional sense in

which that term has now come to have acquired meaning." 15 N.Y. 2d at 164-65, 204 N.E. 2d at 844.

Turning to the facts of the case before it, the court stated:

> In the case before us the movement of the automobile, which was itself the situs of the robbery, was not essentially different in relation to the robbery than would be the tying up of a victim in a bank and his movement into another room. In essence the crime remained a robbery although some of the kidnapping statutory language might literally also apply to it. 15 N.Y. 2d at 165, 204 N.E. 2d at 844.

The court then cited the Chatwin decision as well as legal commentators and scholars in support of its holding:

> Although the Federal Kidnapping Act (U.S. Code, tit. 18, ch. 55, §§1201-1202) differs from ours in test, it, too, is broadly drafted and the Supreme Court in Chatwin v. United States, 326 U.S. 455, 66 S.Ct. 233, 90 L.Ed. 198 took precautions to see that its application was limited to acts which were in the nature of true kidnapping.

> This separation of essentially separate crimes is consistent with the general trend of professional comment and analysis of kidnapping statutes which could be read to include acts which are integral to other crimes and are not essentially kidnapping. (See, e.g., A Rationale of the Law of Kidnapping, 53 Col. L. Rev. 540, n. 20; Judicial Construction of Kidnapping Statutes, 15 Albany L. Rev. 65; Room-to-Room Movement: A Risk Rationale for Aggravated Kidnaping, 11 Stan. L. Rev. 554; Kidnaping and the Element of Asportation, Note 35 So. Calif. L. Rev. 212; Note 110 U. Pa. L. Rev. 293.) 15 N.Y. 2d at 165-66, 204 N.E. 2d at 845.

That this is not a conventional kidnapping is obvious. This type of crime is not the type which Congress sought to protect against in enacting this statute. Yet because of the broad language of the statute, the question remains as to whether the Petitioner's conviction is appropriate and should be sustained under it.

The actions of the Petitioner and his co-conspirators cannot be condoned. Yet

are these actions so reprehensible as to expose the Petitioner to liability for kidnapping? This statute was directed at the type of criminal activity that involved seizing a person and transporting him across state lines to avoid the pursuit of local law enforcement officials. That is simply not the case here.

Anthony Finch, the alleged victim, stole $150 from the defendant Tosini and his friends in an aborted marihuana transaction. A debt such as this could not be recouped through legal process. Two months after the theft, the defendant Tosini and others located Mr. Finch. They forced him into a car and began driving. During the ride, they attempted to recover the money owed.

It is clear from the testimony of Mr. Finch that the supposed abductors

wanted nothing more than what was theirs. By his own testimony, Mr. Finch never believed himself to be kidnapped, nor was he injured in any way. At some point in the journey the relation among the parties became social. Mr. Finch gave the others his telephone number and after alighting from the automobile stood by its side and shared a cigarette with his alleged abductors.

The release itself occured in Bluffton, South Carolina, barely ten (10) miles from Savannah, Georgia, the place where Mr. Finch had been picked up.

To apply this statute to the instant set of facts is to construe the wording of the statute into a meaning far beyond that intended by Congress. It is to employ to the very construction that the Supreme Court warned against in Chatwin, supra:

> Nor is there any indication that Congress desired or contemplated that punishment of death or long imprisonment, as authorized by the Act, might be applied to those guilty of immoralities lacking the characteristics of true kidnappings. In short, the purpose of the Act was to outlaw interstate kidnappings rather than general transgressions of morality involving the crossing of state lines. And the broad language of the statute must be interpreted and applied with that fact in mind.

In the District Court heavy reliance was placed on the decision in United States v. De La Motte, 434 F. 2d 289 (2 Cir. 1970), cert. denied 401 U.S. 921. This case, of course, is a Second Circuit Opinion and must defer to the Supreme Court ruling in Chatwin, supra. Yet it is distinguishable from the instant case nonetheless. In De La Motte, supra, a truck driver was abducted for the purpose of effectuating the hijacking a truck full of cargo. The driver was forced from the truck at gun point and taken

across state lines to a wooded area where he was secreted and left tied to a tree. We have here what the court described as "an extended planned detention to enable the hijackers to transport interstate and conceal the truck cargo." 434 F. 2d at 293. In the instant case the detention was neither extended nor planned. The intent of the Defendants was to recover money stolen and not to hold the victim to effectuate another crime. The victim in De La Motte was an innocent party and this certainly is not the case with Mr. Finch. Mr. Finch's prior criminal conduct invited the Defendants' response and this fact alone distinguishes it from De La Motte. The defendants here simply wanted what was theirs and unfortunately picked the wrong method to accomplish this end.

But the most telling distinction is

that the defendant here drove over state line not to evade law enforcement officials, but to release the supposed victim. Finch was not left tied to a tree, as was the truck driver in De La Motte. He was amicably released.

This case bears no factual relation to the kidnapping incidents envisioned by the proponents of the Federal Kidnapping Statute. The conduct of the participants in this case is adequately proscribed by state law. No special Federal authority was necessary, either to recover the alleged victim, locate the supposed perpetrators, or prosecute the alleged crime. State lines were not used as a shield from local authorities. The Georgia - South Carolina border was nothing more than a happenstance to the defendant Tosini, a Parris Island marine who frequently sought relaxation in

Savannah, the nearest city.

Federal jurisdiction should not be invoked each time the facts of a particular case can be adequately described by Federal statute. Such action merely stretches Federal executive and judicial resources to involvement in incidents in which it is unnecessary and wasteful.

From a defendant's point of view, the uncalled for extension of Federal authority subjects him to potential punishment far beyond that envisioned by local and state authorities. The coincidence of a convenient state border, playing no role in the supposed crime, should not be abused by Federal authorities to intervene in otherwise simple local matters.

The crime of kidnapping is considered in our society as a heinous act. A conviction for this crime brands the culprit

as a social misfit for the rest of his life. No leniency in sentencing can mitigate the damage done to an individual convicted under this statute. This court must determine if the transgressions committed by John Richard Tosini are of such a magnitude to warrant this social stigma. To affirm this conviction the court must extend the application of this statute far beyond the parameters intended by Congress. Given this particular set of facts the interests of justice will not be served by such an extention. It is possible to construe the acts committed by the Defendant Tosini as violative of the wording of the Act. It is not possible to determine that either the intent or the spirit of the statute has been so violated. Justice demands a reversal.

CONCLUSION

The petition for certiorari should be granted because the facts of this case do not support the application of 18 United States Code §1201, the Federal Kidnapping Statute.

Respectfully submitted,

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SPECIAL FINDINGS AND JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	X	
	X	INDICTMENT
VS.	X	No. 5674
	X	
JOHN RICHARD TOSINI, ET AL.	X	

SPECIAL FINDINGS AND JUDGMENT

The Grand Jury of the United States District Court for the Southern District of Georgia charged that on or about July 6, 1973, in Chatham County, within the Southern District of Georgia, Gerald Fay Popp, James Patrick McGough, Miguel Angel Melendez, John Richard Tosini, and Ronald Ancel Dean, hereinafter denominated defendants, wilfully and knowingly did transport in interstate commerce from Savannah, Georgia, to the State of South Carolina, Anthony Elton Finch, who had theretofore been un-

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lawfully seized, confined, inveigled, decoyed, kidnapped, carried away and held by the said defendants for ransom, reward and otherwise, that is, for the purpose of extorting from Anthony Elton Finch the sum of $150.00; in violation of 18 U.S.C., Section 1201.

John Richard Tosini, one of the defendants, pled not guilty and consented to a trial on October 29, 1973, by the Court without a jury, waiving any special findings by the Court.

The parties stipulated that the Court could consider the statements made by each of the defendants and the victims to the FBI, as reduced to writing, as and for sworn testimony of the declarants. The statements were marked and introduced into evidence.

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From these statements, the Court finds that during the middle part of May, 1973, Tosini, Popp and McGough, all young Marines, approached the victim Finch for the purpose of buying some marijuana. One Hundred and Fifty Dollars was given to Finch, $70 by Tosini and $80 by McGough for the purpose of purchasing one pound of the drug. Finch gave Tosini his wallet as collateral and was driven to a house on Gwinnett Street, in Savannah, Georgia, where he was to get the marijuana.

Instead, Finch, after going into the house, became "high on marijuana," and decided to keep the $150. After waiting for about two hours for Finch to emerge from the house with the drug, Tosini and Popp saw him leave with an unidentified female

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and drive off in a car at high speed. After a high speed chase, the Finch car stopped, the female occupant got out of the car and threatening Popp with a gun ordered him not to follow her anymore, and the pursuit closed.

On July 6, 1973, Tosini and the remaining defendants decided to go into Savannah, Georgia, for the purpose of locating Finch and trying to get their $150. They located Finch at a bar and inveigled him to their car where Tosini and Melendez beat Finch and forced him into the car.

The car containing the defendant and the victim was driven from Chatham County, Georgia, over into South Carolina into a deserted wooded area. During the course of the ride, both Tosini and Melendez beat

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and punched Finch, and at one time, Melendez placed a knife blade at Finch's throat, demanding the return of the $150.

When abducted, Finch was threatened by Popp with a gun which he (Finch) took to be a .32 caliber pistol.

During the course of the ride, Finch was not only beaten, but robbed of $12 and threatened with death.

Finch was beaten again after the car was stopped and he was forced out of the car in the deserted area in South Carolina, and abandoned.

The Court finds that the defendant, Tosini, did in fact, with the remaining defendants, wilfully and knowingly transport Finch from Savannah, Georgia, into the State of South Carolina after having

abducted him by force for the purpose of extorting from him the sum of $150.

The defendant, placing chief reliance upon Chatwin v. United States, 326 U.S. 455 (1946), advances the argument that the evidence submitted by the Government is insufficient, as a matter of law, to support a finding of guilty under 18 U.S.C. §1201. The thrust of the defendant's argument is that the conduct complained of here is not such conduct as the Federal Kidnapping Act was intended to proscribe and is, therefore, without the ambit of that Act.

The position advanced by the defendant was recently rejected by the Second Circuit Court of Appeals in United States De La Motte, 434 F.2d 289 (2 Cir. 1970),

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cert. denied 401 U.S. 921, a case which involved the interstate abduction of a truck driver for the purpose of effectuating the hijacking of a truck full of cargo. The Court was faced with the assertion that although the abduction of the truck driver literally fell within the requirements of the kidnapping statute, that conduct was in reality an integral part of, or incident to another crime. Thus, the appellant submitted, the court should limit the application of the so-called Lindbergh law to cases involving circumstances similar to those described in Chatwin as factors giving rise to passage of the Federal Kidnapping Act.[1] Reacting to the

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[1]The Chatwin court had noted in part at 462-463:

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broad observations of Chatwin and to the ruling of the New York Court of Appeals in

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"This statute was drawn in 1932 against a background of organized violence. Kidnapping by that time had become an epidemic in the United States. Ruthless criminal bands utilized every known legal and scientific means to achieve their aims and to protect themselves. Victims were selected from among the wealthy with great care and study. Details of the seizures and detentions were fully and meticulously worked out in advance. Ransom was the usual motive. 'Law enforcement authorities, lacking coordination, with no uniform system of intercommunication and restricted in authority to activities in their own jurisdiction, found themselves laughed at by criminals bound by no such inhibitions or restrictions . . . The procedure was simple - a man would be kidnapped in one State and whisked into another, and still another, his captors knowing full well that the police in the jurisdiction where the crime was committed had no authority as far as the State of confinement and concealment was concerned.'

"It was to assist the states in stamping out this growing and sinister menace of kidnapping that the Federal Kidnapping Act was designed. Its proponents recog-

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People v. Levy, 15 N.Y. 2d 159, 256 N.Y.S. 2d 793, 204 N.E. 2d 842 (1965), the Court stated at 292-293:

> "However, such a narrowing of the scope of the kidnapping statute is a legislative rather than a judicial function. The Congress did not "specifically limit the statute to ransom cases and may well have con-

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nized that where victims were transported across state lines only the federal government had the power to disregard such barriers in pursuing the captors. Given added impetus by the emotion which gripped the nation due to the famous Lindbergh kidnapping case, the federal statute was speedily adopted. Comprehensive language was used to cover every possible variety of kidnapping followed by interstate transportation. Armed with this legislative mandate, federal officials have achieved a high and effective control of this type of crime."

sidered the need for federal assistance to the States in preventing interstate transportation of victims kidnapped, bound, transported and detained for reasons other than ransom. Moreover, there was here no momentary detention in the course of a holdup, where it may be doubtful that a state legislature intended to multiply offenses, but an extended, planned detention to enable the hijackers to transport interstate and conceal the truck cargo. We think the Act properly applied to the circumstances of this case."

SPECIAL FINDINGS AND JUDGMENT

The matter at bar is analogous to De La Motte and unlike Chatwin. Chatwin involved the interstate transportation of a minor child for the purpose of having her continue a "celestial" marriage relationship. The Court reversed the convictions of the defendants there under the Federal Kidnapping Act for failure of proof on the essential element that the victim be "held for ransom or reward or otherwise." The court construed such language as requiring that the victim be unlawfully restrained through mental or physical force. In view of the specific finding of the Court that the Government had failed to adduce proof of an "unlawful physical or mental restraint" or of an intent "to confine the girl against her desires," the convictions had to be reversed. Nor

SPECIAL FINDINGS AND JUDGMENT

is the instant case like Shaw v. United States, 299 F.Supp. 824 (S.D.Ga. 1969). There the Court, while inquiring into the voluntariness of a guilty plea, noted by analogy to Chatwin that the Government's kidnapping case against the petitioner had been "weak in law." The evidentiary matter before the Shaw court concerned the inveigling of two minors across state lines for the purpose of sexual gratification. The Court suggested that the two girls may not have been "held" within the meaning of the Federal Kidnapping Act because the evidence indicated that each had been, while outside of the State, away from the petitioner for a sufficient amount of time to flee. Additionally, both girls had been seen by a motel manager alone and seemingly "happy."

SPECIAL FINDINGS AND JUDGMENT

Unlike the instant matter, there were present in both Chatwin and Shaw elements of consent on the part of the victims. In each case the inquiry concerned whether a "holding" had been established or alleged. The presence of such inquiry distinguishes these cases from the matter at bar in which coercion has been clearly shown.[2]

The elements of an 18 U.S.C. §1201 offense were recently enumerated by the Fifth Circuit Court of Appeals in Hattaway v. United States, 399 F.2d 431, 433 (5 Cir. 1968) as:

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[2]See United States v. Healy, 376 U.S. 75 (1964) at 82, n. 6, where the Court in distinguishing the holding in Chatwin noted: "There the element of coercion or deception, central to the crime of kidnapping, was absent."

SPECIAL FINDINGS AND JUDGMENT

"(1) The transportation in interstate commerce,

(2) of an unconsented person who is

(3) held for ransom, reward, or otherwise, and

(4) doing such acts knowingly and wilfully."

Each of the above enumerated elements is satisfied by the factual findings made herein.

Accordingly, I find as a matter of fact and conclude as a matter of law that the defendant, John Richard Tosini, is guilty as charged.

This 15th day of November, 1973.

/s/ Anthony A. Alaimo

U.S. District Judge

ORDER OF THE COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 74-1189

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN RICHARD TOSINI,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA

May 29, 1974

Before BELL, SIMPSON and INGRAHAM, Circuit Judges.

PER CURIAM:

AFFIRMED. See Local Rule 21.[1]

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1 See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F. 2d 966.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1952

JOHN RICHARD TOSINI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to sustain his conviction for kidnapping.

After a jury-waived trial in the United States District Court for the Southern District of Georgia, petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201. He was sentenced to two years' probation. The court of appeals affirmed *per curiam* (Pet. App. A-15).

In May 1973, petitioner and two companions, all of whom were stationed at the Marine Base at Paris Island, South Carolina, gave one Finch $150 for the purchase of marihuana. Finch pocketed the money without delivering the marijuana. Some two months later, petitioner and his two companions located Finch at a bar in Savannah, Georgia. They beat Finch, forced him into their car, and at knife point demanded the return of their $150. They

then drove off with him in the car and after beating him again and taking a small amount of money from him, drove (from Georgia) to a deserted area in South Carolina, where they forced him out and left him. (Pet. App. A-3--A-6). The district court held that the evidence established (1) the transportation in interstate commerce (2) of an unconsenting person who (3) was held for ransom, reward, or otherwise and (4) that petitioner's conduct was knowing and willful (Pet. App. A-14).

Petitioner contends that the Federal Kidnapping Act "was not intended to create a 'new' crime as such but was to provide a means by which Federal law enforcement authorities could intervene in the investigation and apprehension of individuals who committed the traditional crime of kidnapping in the various states" and therefore cannot apply to a case in which money is not extorted from a person other than the immediate victim (Pet. 14). While the statute as originally enacted in 1932 required that the transported person be held "for ransom or reward", the act was broadened in 1934 so as to read "for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof." *Gooch* v. *United States*, 297 U.S. 124. Whatever validity petitioner's contention may have had under the original act, it has none under the 1934 amendment. The conduct of petitioner was plainly within the proscription of the statute. *United States* v. *Healy*, 376 U.S. 75, 81-82; *United States* v. *Sierra*, 452 F. 2d 291 (C.A. 10); *Gawne* v. *United States* 409 F. 2d 1399, 1403 (C.A. 9); *Brooks* v. *United States*, 199 F. 2d 336 (C.A. 4).

Nor does petitioner show any authority for his interpretation of the statute. Contrary to the situation in *Chatwin* v. *United States*, 326 U.S. 455, upon which petitioner relies, Finch was clearly deprived of his liberty. Petitioner's plea ~~tht~~ but his actions were justified by the prior miscon-

duct of Finch (Pet. 26), is without merit. Regardless of the provocation, petitioner's conduct was seriously wrong and was forbidden by the statute. The provocation given by Finch was adequtely recognized by the court in the sentence (two years' probation) imposed.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.